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March 7, 2002

Via HAND DELIVERY

William F. Caton, Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues; CS Docket No. 00-96
***Ex Parte* Letter**

Dear Mr. Caton:

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), EchoStar Satellite Corporation ("EchoStar") hereby responds to the supplemental filing of the National Association of Broadcasters ("NAB") dated February 13, 2002, and the letter filed by WLNY-TV and Golden Orange Broadcasting Co. (hereinafter "WLNY-TV") dated February 19, 2002.

NAB's Supplemental Filing

The NAB is wrong in asserting that the Commission has the authority to prohibit satellite carriers from requiring a second dish that is provided free of charge. While persisting in the mistaken argument that the Commission has already construed Section 338 to categorically ban second dishes, the NAB generally does not dispute—even belatedly—that the implementing regulation does not prohibit the use of a free second dish.

Rather, the NAB's principal thrust is to argue that the Commission has the authority to act under the statute. EchoStar argued in its opposition that the anti-discrimination provisions of Section 338(d) are very specific and do not apply in these circumstances. *See* EchoStar's Opposition at 4-8. The NAB does not dispute this argument, but responds by saying that, because "Congress did not *bar* the Commission from stopping this evasion," the Commission has jurisdiction to act under *Chevron* step-two. NAB Supplemental Filing, at 3. This is a misapplication of the *Chevron* doctrine.

In the first place, a statute is not ambiguous merely because it does not explicitly withhold authority from the agency. The courts have held that an agency may not obtain a power that Congress did not grant simply by applying the *Chevron* framework to congressional silence.

See, e.g., Ethyl Corp. v. EPA, 51 F3d 1053, 1060 (D.C. Cir. 1995) ("To suggest . . . that *Chevron* step two is implicated any time a statute does not negate the existence of a claimed administrative power . . . is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent") (citation and quotations omitted); *see also* Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 ADMIN. L. REV. 363, 370-71 (1986) (the theory that Congress has, by leaving a gap or ambiguity, implicitly delegated the authority to the agency is a "fiction").[1] Second, in this instance, it is clear that Congress affirmatively did not intend to give the Commission this authority. As EchoStar pointed out in its opposition, Congress limited the grant of regulatory jurisdiction to those specific types of discrimination enumerated in the statute, none of which apply in these circumstances. It is evident that Congress did not intend to enact a categorical ban on all second dishes as the NAB urges, because it eliminated a provision that would have accomplished precisely this result. "[H]ornbook law has it that Congress does not intend *sub silento* to enact statutory language that it has earlier discarded." *Bank of Am. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 484 (1999). Lastly, the Commission has already promulgated its interpretation of Section 338, see 47 C.F.R. 76.66(i)(4), and the NAB makes no credible argument that EchoStar's activity violates the plain meaning of that regulation. *Cf. United States v. Mead,* 121 S. Ct. 2164, 2171 & n.8 (2001) (agency's interpretation entitled to less deference when it changes).

Even assuming the Commission had the statutory authority, the NAB is also wrong in asserting that the Commission may promulgate a new rule without going through the notice-and-comment rulemaking process. EchoStar established in its opposition that the Commission is required to follow normal APA notice-and-comment rulemaking procedures when it adopts a new position inconsistent with the governing regulation. *See* EchoStar Opposition, at 18-19. Despite the NAB's claims (p. 6-7), the "good cause" exception to APA notice-and-comment rulemaking, see 5 U.S.C. 553(b)(3)(B), does not apply here. Courts have construed this exception very narrowly. *See Utility Solid Waste Activity Group v. EPA,* 236 F.3d 749, 753-55 (D.C. Cir. 2001) ("we are mindful of our precedents that the 'good cause' exception is to be 'narrowly construed and only reluctantly countenanced.'") (citations omitted). "The exception is not an escape clause; its use should be limited to emergency situations." *Id.* at 754. The NAB makes no effort to show, nor could it, that this case presents an emergency situation, such as an impending crisis to public health or safety, that would warrant forgoing normal APA rulemaking procedures. *See id.*

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[1] *See also Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) ("[I]t is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'"); *Board of Governors of Fed. Res. Sys. v. Dimension Financial Corp.*, 474 U.S. at 374 ("The statute may be imperfect, but the board has no power to correct flaws that it perceives in the statute it is empowered to administer.").

WLNY-TV's Letter

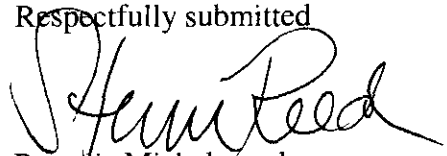
WLNY-TV argues at length that EchoStar's second-dish compliance plan is barred by Section 338(d) because the second dish is a "navigational device." It relies in particular on the definition of "navigation devices" found in an unrelated part of the Commission's regulations, and on certain language found in Section 629 of the Act (which is not a definitional section). *See* WLNY-TV Letter at 2 (relying on 47 U.S.C. § 549 and 47 C.F.R. § 76.1200(c)). However, while EchoStar has questioned whether a satellite dish is intended to be encompassed within the Commission's regulations relating to competitive availability of equipment, the real point is that there is no persuasive basis for assuming that Congress, in enacting Section 338(d), intended the second dish to be considered a "navigational device," and the legislative history strongly suggests otherwise. As noted above, that history makes clear that Congress considered and rejected a provision that would have prohibited all uses of a second dish (the rule sought here by NAB and WLNY-TV). Consequently, it is simply not credible to believe that Congress, having rejected such a ban, intended to enact it through the "back door" by deeming a satellite dish to be a "navigational device."

Moreover, whether a satellite dish is encompassed by the rules relating to competitive availability of equipment (where the Commission has found compelling reasons for a broad reading of the term) is hardly controlling for purposes of construing Section 338(d) or the regulations under that provision. Indeed, the Commission's definition of "navigation devices" in 47 C.F.R. § 1200(c) is expressly prefaced with the phrase "[a]s used in this subpart" (referring to "Subpart P – Competitive Availability of Navigation Devices"), indicating that this definition was *not* intended to be exported to other sections. *Compare Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 783 & n.12 (2000) (refusing to apply a section-specific definition of "person" to a different section, where the definition departed from the usual meaning of that term). Nor does Section 629, which addresses rules for competitive availability of certain equipment, have any application to the subject of must-carry rules for DBS providers. *See McCarthy v. Bronson,* 500 U.S. 136, 142 (1991) ("the fact that Congress may have used the term 'conditions of confinement' in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act"); *United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1440-43 (2001) (refusing to give the phrase "wages paid" the same interpretation in the "discrete taxation and benefits eligibility contexts"). In short, there is no indication that Congress or the Commission, *sub silentio*, intended to bar a free second dish through the "navigational devices" provision when they refused to enact such a provision explicitly.

Finally, as EchoStar stated in its initial filing in this proceeding, the broadcasters' characterization of the second dish flies in the face of actual consumer behavior. EchoStar has built a successful business model on consumers' willingness to *pay* for a second dish when they subscribe to high definition, foreign language, or other specialty content. Hundreds of thousands of EchoStar subscribers acquired a second dish to receive the content they desire. Here, Echostar is *giving away* a second dish to consumers who wish to view certain local channels. Subscribers who receive such dishes not only will be able to view all local channels, but will be able to

subscribe to specialty programming without having to purchase a second dish. If hundreds of thousands of subscribers are willing to buy a second dish to get the programming they want, it is not surprising that thousands of subscribers have obtained a second dish for *free* to get the local channels they want, and to have access to other programming they might want to receive in the future.

Respectfully submitted



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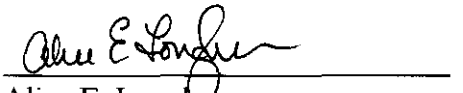

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